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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN MARTINEZ et al., Defendants and Appellants.	B235518 (Los Angeles County Super. Ct. No. BA356465)

APPEAL from judgments of the Superior Court of Los Angeles County, John S. Fisher, Judge. Affirmed in part; reversed in part and remanded.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Joshua R. Galindez.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Adrian Martinez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * *

In connection with a shooting that occurred on May 2, 2009, a jury convicted appellants Adrian Martinez and Joshua R. Galindez of three felonies: (1) the first degree murder of Victor Solis (Pen. Code, § 187, subd. (a); count 1);[1] (2) the willful, deliberate, and premeditated attempted murder of J.M. (§ 664, § 187; count 2); and (3) shooting at an occupied motor vehicle (§ 246; count 4). With respect to all three counts and both appellants, the jury found true a criminal street gang allegation (§ 186.22, subd. (b)(1)(C)). As to all three counts, the jury also found that Galindez personally discharged a firearm causing death or great bodily injury (§ 12022.53, subd. (d)).

In connection with a separate shooting that occurred on May 1, 2009, the jury also convicted Martinez of shooting at an occupied motor vehicle and found true a criminal street gang allegation (§ 246, § 186.22, subd. (b)(1)(C); count 3).

The trial court sentenced Martinez consecutively for the May 2 murder and attempted murder, and for the May 1 shooting at an occupied car, to a total term of "75 years [to life]." The court imposed but stayed, pursuant to section 654, the sentence for the May 2 shooting at an occupied car.

The trial court sentenced Galindez consecutively for the May 2 murder and attempted murder to a total term of "95 [years] to life." The court imposed but stayed, pursuant to section 654, the sentence for the May 2 shooting at an occupied car.[2]

Appellants raise a number of issues on appeal, including one related to sentencing. We asked for supplemental briefing regarding a second sentencing issue. Although we conclude that the case must be remanded for resentencing of both appellants, we otherwise affirm the judgments.

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[1] All future statutory references are to the Penal Code unless otherwise designated.

[2] We decline, at this point, to detail further how the trial court imposed the sentences in this case. The record is not altogether clear and shows inconsistencies between the reporter's transcript and the clerk's transcript. At this point, it is sufficient to say that the sentences imposed, at least in part, are unauthorized by law and appellants must be resentenced. We discuss this issue further in part V.

STATEMENT OF FACTS

A. The Prosecution

Viewed according to the usual rules on appeal -- in the light most favorable to the verdict and with all reasonable inferences drawn in its favor -- the People's case established the following facts.

1. The May 1, 2009 Shooting

At about 12:45 a.m. on May 1, 2009, E.R. drove his pickup truck along Cypress Avenue near Pepper Avenue. A dark Ford Mustang, driven by Martinez and with a front seat passenger, pulled even with and continued alongside E.R. for one to two minutes. Martinez gestured at E.R., who then heard four or five gunshots. E.R. accelerated away from the car and later reported the shooting to the police. He believed Martinez fired the shots because Martinez was the occupant closest to him.

2. The May 2, 2009 Shooting

At about 1:00 p.m. on May 2, 2009, J.M. stopped his car on Pepper Avenue near Cypress Avenue to drop off his girlfriend, G.V. G.V. was in the front seat and Victor Solis was in the back. Martinez, a Cypress Park gang member, approached J.M.'s car, kicked it, stated "This is Cypress Park," and made a Cypress Park gang hand sign. G.V. got out of the car and approached Martinez on the driver's side of the car and asked him to stop. J.M. did not roll down the window of the car during the confrontation with Martinez.

Galindez, another Cypress Park gang member, suddenly appeared towards the rear of the car, on the driver's side. Martinez said, "Shoot these fools," or "Blast these fools," or "Shoot that fool. Pull out the strap." Galindez began firing shots at the car. J.M. drove towards San Fernando Road, and Galindez ran after the car. G.V. ran to her house.

As he drove away, J.M. looked behind and saw Solis hunched over in the back seat. J.M. drove down Pepper and turned right on San Fernando Road. He stopped in a supermarket parking lot where he saw an ambulance. Paramedics attempted to treat Solis at the supermarket. He had, however, suffered a single gunshot wound to the back of the head that was "rapidly fatal."

On May 7, Los Angeles Police Criminalist Alan Perez examined J.M.'s car and found five bullet impacts: to the rear driver's side door, the taillight, the trunk, and two to the rear bumper. Civilian M.O. found one expended 9-millimeter shell casing, and Los Angeles Police Detective Jose Carrillo found three 9-millimeter shell casings, plus "one projectile" at the shooting scene. All recovered casings had been fired from the same gun. M.B., a security guard working near the scene, saw Cypress Park gang member Victor Picena pick up an additional shell casing. When M.B. told Picena to leave them for the police, Picena told him, "Who do you think you are?," and "Do you know where you're at?"

3. Gang Evidence

Los Angeles Police Officer Thomas DeLuccia testified as the gang expert. He had been assigned to the Northeast Gang Enforcement Detail for approximately four years and Cypress Park was one of the primary gangs he monitored.

Cypress Park is a Hispanic gang with approximately 100 documented and 25 active members. Cypress Park's claimed territory is surrounded by territory claimed by its rival, the Avenues, a much larger gang with between 500 and 750 documented members. Because of Cypress Park's size in comparison to its adjacent rival, it adopted "a shoot first and ask questions later mentality" in order to send the message that though it was small, it was not afraid to defend itself with violence. Part of this culture included committing "sensational" crimes, such as acts of violence in broad daylight and shooting random people who entered the neighborhood. Both the May 1 and May 2 shootings occurred within Cypress Park's claimed territory.

Respect is important in gang culture. Gang members earn respect by committing violent crimes. If a gang member is disrespected in some manner, he is "required to take some action." J.M. was disrespectful when he failed to acknowledge Martinez by not rolling down his window.

Both Martinez and Galindez, according to Officer DeLuccia, were members of Cypress Park, based upon self-admissions, their association with other gang members, and their gang tattoos.

Officer DeLuccia was a victim of violence initiated by a Cypress Park gang member. While on uniformed patrol with two other gang officers, DeLuccia attempted to contact Cypress Park gang member Alfredo Melendez. Melendez pulled out a handgun and in the ensuing gunfight, DeLuccia was accidentally shot by one of his partners.

B. Defense Case

1. Galindez

Galindez presented testimony from two civilians, J.G. and F.A. Their testimony suggested that Galindez was at a birthday party in Elysian Park at the time of the May 2 shooting and thus could not have been the shooter.

Dr. Robert Shomer, an eyewitness identification expert, also testified for Galindez. In his testimony, Shomer discussed factors which can lead to a mistaken identification.

2. Martinez

Martinez testified in his defense.

With respect to the May 1 shooting, Martinez admitted to driving the Mustang. He said his passenger was Mariano Rosales, and the two had been to a Dodger game and drinking at a bar. They went to Rosales's house, where Rosales picked up a gun. At a stop light, the truck driven by E.R. pulled next to them. Rosales thought he recognized the driver as an Avenues gang member. He then unexpectedly pulled out the gun and shot at the truck twice. Martinez was angry at Rosales for doing so.

With respect to the May 2 shooting, Martinez testified that he had gone to a Cinco de Mayo carnival in Cypress Park. As he crossed the street, a black car almost struck him. He got angry and walked to the driver's side. He asked the driver, "What's up?," and told him, "Watch the way [you're] fucking driving." He also kicked the car.

G.V. got out of the car and approached him. When she was about four feet away, Martinez heard a gunshot and dropped to the ground. He saw Galindez shooting. After the shooting, Martinez ran away. He did not see Galindez immediately prior to the shooting, although he had seen him earlier at the Cinco de Mayo carnival. He did not tell anyone to shoot at the car.

The police arrested Martinez on May 7, 2009. He spoke to the police, told them "Vago" was the shooter, and identified Galindez as the shooter from a photo lineup. On

October 20, 2010, Martinez gave another statement to the prosecutor in an attempt to obtain leniency. He provided additional facts about the shooting.

Because he cooperated with law enforcement, Martinez was a "marked man" and had been "green light[ed]" for killing.

DISCUSSION

I. Sufficiency of the Evidence

Martinez contends the evidence is insufficient to establish the premeditation and deliberation required for the first degree murder of Solis and for the analogous enhancement found true in connection with the attempted murder of J.M. Galindez claims that the evidence does not show an intent to kill J.M. and his attempted murder conviction must therefore be reversed. Appellants' contentions are without merit.

A. Standard of Review

An appellate court reviewing a challenge based on sufficiency of the evidence at trial must review the entire record in the light most favorable to the People and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Put another way, the appellate court reviews the entire record in the light most favorable to the verdict and determines whether there is substantial evidence – evidence that is reasonable, credible, and of solid value – such that a reasonable juror could find the defendant guilty beyond a reasonable doubt. (*Ibid*.; see also *People v. Osband* (1996) 13 Cal.4th 622, 690.)

When making such an evaluation, the appellate court does not reevaluate witness credibility or resolve conflicts in the evidence. Such matters are exclusively issues for the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Further, the reviewing court must accept logical inferences that the jury might have drawn from any circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) While it is the jury's duty to acquit where circumstantial evidence is subject to two reasonable interpretations, one which points to guilt and one which points to innocence, it is the jury, not the appellate court, that must be convinced beyond a reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) Where circumstances reasonably justify a jury's findings of

fact, a reviewing court's conclusion that such circumstances might also reasonably be reconciled with contrary findings does not justify reversal. (*Id.* at p. 1054.)

B. Murder, Attempted Murder, and Transferred Intent

Murder is the unlawful killing of a human being with malice aforethought. (§ 187.) Malice is express when a defendant intends to kill. (§ 189.) Malice is implied when (1) a defendant intentionally commits an act, (2) the natural consequences of the act are dangerous to human life, (3) he knows the act is dangerous to human life, and (4) he deliberately acts with conscious disregard for human life. (*People v. Knoller* (2007) 41 Cal.4th 139, 143.)

In the context of this case, a murder that is willful, deliberate, and premeditated is of the first degree. (§ 189.) A "willful" murder is an intentional murder; in other words, a murder committed with express malice. (*People v. Moon* (2005) 37 Cal.4th 1, 29.) A murder is "premeditated" when it is "'considered beforehand,'" and it is "deliberate" when it is "'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' [Citations.]" (*Ibid.*; *People v. Perez* (1992) 2 Cal.4th 1117, 1127.)

People v. Anderson (1968) 70 Cal.2d 15, 26-27 (*Anderson*), sets forth three types of evidence ordinarily used to establish premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. Although the *Anderson* factors provide, essentially, a "'synthesis of prior case law,'" they "'are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case.' [Citations.]" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 768.) To sustain a verdict of first degree murder based upon premeditation and deliberation, evidence of all three *Anderson* categories is not required. (*People v. Perez*, *supra*, 2 Cal.4th at p. 1125.)

Attempted murder requires (1) a specific intent to kill and (2) a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith* (2005) 37

Cal.4th 733, 739.) Unlike murder, an attempted murder therefore requires express malice and cannot be proved based upon a showing of implied malice. (*People v. Bland* (2002) 28 Cal.4th 313, 327.) Also, unlike murder, attempted murder is not divided into degrees. The prosecution, though, can seek a special finding that the attempted murder was willful, deliberate, and premeditated, for purposes of a sentencing enhancement. (*People v. Bright* (1996) 12 Cal.4th 652, 665-669, overruled on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 547, fn. 4, 550, fn. 6.)

Under the doctrine of transferred intent, a defendant who intends to kill a certain person and either additionally or instead kills a bystander is guilty of the bystander's murder. (*People v. Bland, supra,* 28 Cal.4th at p. 321.) The doctrine does *not* apply to attempted murder: one who intends to kill a certain person is not guilty of attempted murder of a bystander even if the doctrine of transferred intent would have made the crime murder had the bystander been killed. (*Id.* at pp. 327-328.)

A defendant, however, may still be guilty of attempted murder in connection with a group attack under the doctrine of concurrent intent. (*People v. Bland*, *supra*, 28 Cal.4th at p. 329.) A concurrent intent to kill exists where "'the nature and scope of the attack, while directed at a primary victim, are such that [the jury] can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.' [Citation.]" (*Ibid.*) Cases applying this doctrine can be described as "kill zone" cases. (*Id.* at p. 330.)

C. Martinez's Claim

Martinez contends that evidence in connection with the May 2 shooting shows "a sudden confrontation that was entirely spontaneous and not planned in any way." Thus, he concludes, the killing of Solis is only second degree murder and the attempted killing of J.M. only simple attempted murder. We disagree.

Based upon the evidence presented at trial, the jury could reasonably find all of the following facts. Both appellants were members of Cypress Park, a gang that needed to commit sensational and random acts of violence in order to enhance its reputation and thereby ensure its survival vis-á-vis larger and more powerful rival gangs. Both appellants knew each other, and Martinez admitted to seeing Galindez at the Cinco de

Mayo carnival prior to the shooting. J.M. committed acts of disrespect when (1) he almost drove his car into Martinez and (2) failed to roll down his window in acknowledgement of Martinez's approach. Although at trial J.M. denied hearing anything said prior to the shooting, he told officers at the scene that Martinez said, "Shoot that fool. Pull out the strap." He told detectives in a later interview that Martinez said, "Blast these fools. Shoot these fools."

These facts are sufficient to support the jury's finding that the murder of Solis and attempted murder of J.M. were willful, deliberate, and premeditated. J.M.'s acts of "disrespect" provided the trigger or motive for Martinez's encouragement of Galindez to shoot. Martinez's decision to kill, however, was anything but "spur of the moment." His criminal street gang membership generally, and Cypress Park membership in particular, allowed the jury to conclude that he had already contemplated the use of deadly force as a response to even the slightest provocation before the confrontation with J.M. even occurred. His statements immediately prior to the shooting show that he knew Galindez was (1) present, (2) ready to back him up if necessary, and (3) armed with a loaded gun. Together, these facts demonstrate both a deliberate decision to use lethal force and a premeditated plan to implement that decision if a situation arose that required it. Nothing more is necessary under the law to establish deliberation and premeditation given the circumstances of this case.

Martinez contends that G.V.'s testimony that Martinez looked "surprised" when the shooting began is "irrefutable evidence" that Martinez was unaware of Galindez or that a shooting was about to occur. We disagree. It is not our task, when reviewing sufficiency, to substitute our judgment for that of the jury. Given the evidence of Martinez's verbal encouragement of Galindez, the jury was entitled to disregard this portion of G.V.'s testimony or simply conclude that she misinterpreted Martinez's facial expression. We will not second guess the jury's decision to do so.

D. Galindez's Claim

Galindez argues because all of his shots struck the back of J.M.'s car, the evidence shows only an intent to kill Solis, the backseat passenger, and does not establish his intent

to kill J.M. Because the intent to kill Solis may not be transferred to J.M., Galindez continues, his conviction for attempted murder must therefore be reversed. We disagree.

First, Galindez's characterization of the physical evidence is incorrect: at least one shot hit the rear driver's side door of J.M.'s car. Second, Galindez fired from a position behind J.M.'s car. Given that position, the location of the bullet impacts to the back or rear driver's side of the vehicle are entirely consistent with an intent to kill the driver. Third, J.M. began driving away immediately as the shots were being fired, thereby presenting a moving target, which also explains the impact of the bullets away from the immediate location of the driver. Fourth, the altercation that prompted the shooting was between Martinez and the driver, J.M., not Martinez and the backseat passenger, Solis. Fifth, based on the forensic evidence and the testimony of M.B. the jury could find that Galindez fired at least five rounds at J.M.'s car. Based on these facts, the jury could reasonably conclude that Galindez's primary target was the driver of the vehicle, and that he concurrently intended also to kill anyone who happened to be riding with the driver.

II. Admission of Martinez's October 20, 2010 Proffer

As mentioned above, Martinez spoke to law enforcement on two separate occasions: once on May 7, 2009, after his arrest, and again on October 20, 2010, in an effort to obtain leniency or immunity from the prosecutor. After Martinez testified on direct examination, the trial court allowed Galindez, over the objection of both Martinez and the People, to cross-examine with portions of the October 20 proffer. Thereafter, the prosecutor also cross-examined Martinez using portions of the proffer. Martinez contends that because his October 20 statement was part of an offer to plead guilty to a reduced charged, it could not be used against him at trial and his conviction must therefore be reduced. Again, we disagree.

A. The Trial Record

During his direct examination, Martinez admitted he had driven the Mustang involved in the May 1 shooting and admitted approaching J.M.'s car just prior to the May 2 shooting. He effectively denied criminal involvement in either shooting, however,

testifying that each was an unplanned, spontaneous act by either Rosales or Galindez that caught him by surprise.

During her cross-examination, the prosecutor confronted Martinez with portions of his May 7, 2009 postarrest interview by police detectives.

Galindez's counsel cross-examined Martinez after the prosecutor. Partway through cross, Galindez's lawyer sought to confront Martinez with statements he made during his October 20, 2010 proffer to the district attorney. Martinez's counsel objected, for two reasons: (1) although not entirely clear, apparently because it was part of an offer to cooperate, and (2) because it was not proper impeachment. The prosecutor also objected, "for the record," arguing that "it appears to be in violation of the proffer agreement." The trial court overruled the objections, specifically finding that use of the proffer did not violate the terms of the proffer agreement.

Martinez's counsel then argued that if Galindez was allowed to offer certain portions of the proffer, the entire proffer should be admissible. The trial court agreed.

Next, Galindez's counsel argued that the proffer agreement itself should be admitted. Martinez's counsel objected, arguing that the agreement "didn't conform to established law." The court overruled the objection, finding the proffer agreement itself relevant on the issue of bias.

The bulk of Galindez's counsel's cross sought to show that Martinez's trial testimony, large portions of which were consistent with the October 20 proffer, was, like the October 20 proffer, fabricated to obtain immunity or a deal involving a plea to a lesser charge. Counsel specifically pointed out that Martinez told officers during the May 7 interview that he never saw the gun used by Galindez but admitted during the October 20 proffer that he saw Galindez at the carnival prior to the shooting and was aware Galindez was armed.

B. Discussion

Penal Code section 1192.4 prohibits the use of a withdrawn plea of guilty against a defendant. Evidence Code section 1153 also prohibits such a use of a withdrawn plea, and also prohibits the similar use of an *offer* to plead guilty. The purpose of these two statutes is to promote the public interest by encouraging the settlement of criminal cases

without the necessity of a trial. (*People v. Sirhan* (1972) 7 Cal.3d 710, 745, overruled on other grounds as stated in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593, fn. 7.)

In *People v. Tanner* (1975) 45 Cal.App.3d 345, 351-352 (*Tanner*), Division Four of this district, based upon the same policy consideration, extended the rule to encompass admissions, incidental or otherwise, made by a defendant in the course of bona fide plea negotiations. In *Tanner*, the court reversed the defendant's conviction when such admissions were presented as part of the People's case-in-chief. (*Id.* at pp. 348, 353-354.)

In *People v. Crow* (1994) 28 Cal.App.4th 440, 452 (*Crow*), Division Four again revisited this issue, and significantly limited the holding of *Tanner*: "[W]e conclude that the rule of *Tanner* -- that evidence of statements made or revealed during plea negotiations may not be introduced by the People -- must be limited to those situations in which those statements are offered as substantive evidence of guilt, either in the prosecution's case-in-chief or otherwise. That rule does not prevent the prosecution from using evidence of those statements for the limited purpose of impeaching the defendant regarding testimony which was elicited either during the direct examination of the defendant or during cross-examination which is plainly within the scope of defendant's direct examination."

Here, it is *Crow*, not *Tanner*, that controls. The admissions by Martinez concerning the May 1 and May 2 shootings were not offered by the People as substantive evidence of guilt during their case-in-chief, but by a codefendant after the defendant testified in order to impeach testimony which incriminated that codefendant.[3] The trial

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[3] Martinez argues additional error because the trial court did not instruct the jury to use the October 20 proffer only for purpose of impeachment and not as substantive evidence of guilt. It does not appear from our review of the trial record that Martinez's trial counsel requested such a limiting instruction and Martinez's appellate counsel does not direct us to any such request. Accordingly, this claim has been waived, both at the trial and appellate levels. (See *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 [failure to object below waives issue on appeal]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [the appellate court is "'not required to discuss or consider points which are not argued or which are not supported by citation to authorities *or the record*'" (italics added)].) Nor do we find Martinez's trial counsel ineffective, see *post*, at pages 15 to 17,

court did not err by allowing Martinez to be cross-examined by his admissions made during his proffer.

With respect to the October 20 proffer, Martinez contends the trial court erred in two other ways: (1) by admitting evidence of the proffer agreement itself and (2) by admitting Martinez's statements during the October 20 proffer that he was willing to act as an informant on 17 other unsolved criminal cases. Martinez argues that admission of the proffer agreement prejudiced him because it expressly provided that the prosecutor would consider the credibility of his statement before extending any plea agreement and, since no agreement was reached, it implied the prosecutor found him not credible. Martinez claims the reference to 17 cold cases prejudiced him because it suggested he was involved in other criminal activity.

We first observe that both the proffer agreement and Martinez's willingness to act as an informant on 17 other cases were relevant to his credibility as a witness: the first provided the terms of his proffer and was thus relevant to the *jury*'s evaluation of his motivation to provide the proffer and the second demonstrated the lengths to which he was willing to go in order to obtain leniency, a matter also relevant to his credibility. Both, however, also presented areas of possible prejudice: the first did provide a vehicle for Galindez to argue that the *prosecutor* did not believe Martinez's proffer (which Galindez did, in fact, argue) and the second could have suggested that Martinez was involved in -- as opposed simply to having information about -- 17 other criminal cases.

Reversal on these grounds, however, is not appropriate. To the extent the trial court's balancing should have come out on the side of exclusion -- and we expressly choose not to decide that point -- it is not reasonably probable that Martinez would have obtained a better result had the evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Although the prosecutor ethically could not express her personal belief about Martinez's credibility, her impeachment of J.M. regarding statements he overheard

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for failing to request such an instruction: since Martinez's proffer was in major respects consistent with his trial testimony, counsel tactically could have concluded that it was to Martinez's benefit to allow the jury to consider the proffer as substantive evidence tending to show innocence.

Martinez make prior to the shooting and her initial cross-examination of Martinez clearly demonstrated that the People's theory of the case was that Martinez expressly encouraged Galindez to shoot, and his denial of such encouragement should not be believed by the jury. Thus, Galindez's counsel's closing argument added little to what was always implicit in the People's theory of the case. With respect to the reference to the 17 unsolved cases, no one argued or even suggested that Martinez was involved in those cases, only that he claimed to have information about them. In the context of other evidence in this case -- especially Martinez's questionable assertion that two shootings committed in his presence by fellow gang members less than 48 hours apart were complete surprises to him -- the error, if any, was harmless.

III. Ineffective Assistance of Counsel

Martinez next contends that he received ineffective assistance when his trial counsel failed to request exclusion of Officer DeLuccia's expert testimony based on his "bias" from having been a victim of gang violence. This contention is meritless.

Constitutionally deficient representation requires proof of two factors: (1) that counsel's performance was deficient; in other words, it fell below an objective standard or reasonableness based on prevailing norms; and (2) the deficiency was material in the sense that but for counsel's errors, the outcome would have been more favorable to the defendant. (*In re Cudjo* (1999) 20 Cal.4th 673, 687; see *Strickland v. Washington* (1984) 466 U.S. 668, 687, 696.) When evaluating the adequacy of a lawyer's performance, reviewing courts typically defer to counsel's reasonable tactical decisions. (See *People v. Wright* (1990) 52 Cal.3d 367, 412, overruled on other grounds as stated in *People v. Williams* (2010) 49 Cal.4th 405, 458-459.)

In the immediate case, trial counsel objected to Officer DeLuccia's testimony about being shot during a confrontation with a Cypress Park gang member. The trial court overruled the objection, finding the evidence more probative than prejudicial. Having lost that objection, trial counsel could have made a reasonable tactical decision that proceeding with DeLuccia as the expert was in Martinez's interest: (1) exclusion of DeLuccia would have simply resulted in the prosecution calling another officer as its gang expert; (2) DeLuccia was not shot by a gang member but by a fellow officer in a

confrontation with a gang member; and (3) under those circumstances, counsel's ability to argue that DeLuccia was biased because of the shooting presented a net benefit. Thus, counsel's performance was not deficient.

Counsel's performance was not deficient for yet another reason: "[c]ounsel is not ineffective for failing to make frivolous or futile motions." (*People v. Thompson* (2010) 49 Cal.4th 79, 122.) Here, there was no legal basis for disqualifying DeLuccia altogether as an expert witness. A witness may testify as an expert if he has the "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720; see *People v. Vang* (2011) 52 Cal.4th 1038, 1044.) The trial court has wide discretion in determining whether or not a witness is qualified to testify as an expert, and its ruling will not be disturbed on appeal absent a clear abuse of that discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175; *People v. Williams* (1989) 48 Cal.3d 1112, 1136.)

Based on his background, training, and experience, Officer DeLuccia was clearly qualified to testify as an expert on Hispanic gangs generally and the Cypress Park gang specifically. DeLuccia had been a police officer for 18 years, assigned to the Northeast Division (which encompasses the territory claimed by Cypress Park) for five years, and within Northeast had been assigned to the Gang Enforcement Detail for four years. Cypress Park was one of the primary gangs DeLuccia monitored. During this experience, DeLuccia had "hundreds" of contacts with gang members generally and Cypress Park members specifically. He had investigated numerous gang-related crimes, spoken to gang members, their families, and members of the community terrorized by gangs. The fact that DeLuccia had been shot during a confrontation with a Cypress Park gang member does not undercut, in any way, these otherwise valid expert qualifications.

We agree with the People. None of the cases cited by Martinez in his brief stand for the proposition that an expert must be completely free from bias before he can testify. (See *People v. Kelly* (1976) 17 Cal.3d 24, 38 [impartiality of expert testimony regarding scientific acceptance of voiceprint analysis questioned when expert was leading proponent of analysis]; *People v. Johnson* (1993) 19 Cal.App.4th 778, 789-790 [expert testimony regarding inmates' tendency to lie properly excluded because of dubious

scientific basis and because issue was not beyond the common experience of the average juror]; *People v. King* (1968) 266 Cal.App.2d 437, 458 [scientific acceptance of voiceprint analysis not established when based on subjective opinion of sole proponent].) Nor is such a rule, in our opinion, even workable. Experts, oftentimes, are paid or, in this case, effectively employed, by one side or the other, so there are always factors upon which an argument of bias can be based. That Officer DeLuccia was shot during an altercation with a Cypress Park gang member gave him, perhaps, a more direct experience with gang-related violence than the average officer who simply investigates gang crimes, but it did not make him so fundamentally different that he could be properly disqualified from testifying despite otherwise sufficient qualifications. The jury was fully apprised of the shooting and could evaluate its impact on DeLuccia's objectivity. That was sufficient to ensure Martinez's right to a fair trial. Any attempt to disqualify DeLuccia would have been frivolous and properly denied.

IV. Sua Sponte Voluntary Manslaughter Instruction

Martinez next contends the trial court had a sua sponte duty to instruct the jury on heat of passion voluntary manslaughter. Again, we find this contention to be without merit.

Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) A defendant who kills in a sudden quarrel or heat of passion lacks malice and is guilty of voluntary manslaughter. (*People v. Lasko* (2000) 23 Cal.4th 101, 108; *People v. Breverman* (1998) 19 Cal.4th 142, 163.) Although section 192 refers to "sudden quarrel or heat of passion," it is provocation that distinguishes this form of voluntary manslaughter from murder. (*People v. Lee* (1999) 20 Cal.4th 47, 59; accord, *People v. Avila* (2009) 46 Cal.4th 680, 705.) The provocation that prompts a defendant to homicidal conduct must be caused by the victim, or be reasonably believed by the defendant to have been caused by the victim. (*Lee*, at p. 59; accord, *Avila*, at p. 705.) The provocation must also be such that would "cause an ordinarily reasonable person to act rashly and without deliberation, and from passion rather than judgment." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1086.)

In *People v. Romero* (2008) 44 Cal.4th 386, 402-403, the Supreme Court summarized the standards which define a trial court's sua sponte obligation to instruct on lesser included offenses: "A defendant's constitutional right to have the jury determine every material issue presented includes the obligation of a trial court to instruct the jury on the general principles of law relevant to the issues raised by the evidence. [Citations.] Thus, a trial court must give '"'instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offenses were present [citation], but not when there is no evidence that the offense was less than that charged.'"' [Citation.] 'As our prior decisions explain, the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed.' [Citation.]"

In the immediate case, there was no substantial evidence that would support a voluntary manslaughter instruction. The confrontation between J.M. and Martinez was not such that a reasonable person might have been provoked to act rashly and without deliberation: narrowly missing a pedestrian with a car and failing to roll down a car window when confronted by the pedestrian do not legally qualify as provocation sufficient to mitigate a homicidal reaction, in this case encouraging a fellow gang member to "Shoot that fool. Pull out the strap."

The trial court was not obligated to instruct on voluntary manslaughter for an additional reason. Martinez's defense was not that he participated in the shooting out of rage or anger, but, instead, that he did not participate at all. His defense was that he never encouraged Galindez to shoot and that he was completely surprised when Galindez did so. Thus, Martinez denied all complicity in the shooting. "Generally, when a defendant completely denies complicity in the charged crime, there is no error in failing to instruct on a lesser included offense." (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709.) Martinez provides no reason why we should ignore this rule under the facts of this case.

Indeed, it is apparent why his trial counsel, as a tactical matter, did not affirmatively request such an instruction. Doing so would have required him to argue to the jury that his client did not encourage Galindez to shoot but, if he did, he did so out of anger. Arguing from both sides of one's mouth is rarely a good way to convince a jury to acquit or convict of a lesser charge.

V. Sentencing Error

The trial court sentenced appellants on separate dates.

A. Murder and Attempted Murder

With respect to Martinez, the trial court sentenced him to 25 years to life for the first degree murder of Solis, plus an additional 15-year determinate term for the gang allegation. For the willful, deliberate, and premeditated attempted murder of J.M., the trial court sentenced Martinez to a consecutive term of "life or 15 to life," and imposed but stayed a 15-year determinate term for the gang allegation.

With respect to Galindez, the trial court sentenced him to 25 years to life for the first degree murder of Solis, plus an additional consecutive term of 25 years to life for the firearm enhancement, plus an additional 15-year determinate term for the gang allegation. With respect to the willful, deliberate, and premeditated attempted murder of J.M., the trial court sentenced Galindez to 15 years to life, plus a 10-year determinate term for the firearm enhancement, plus an additional 15-year determinate term for the gang allegation. The trial court, however, stayed execution of the 15-year term for the gang allegation pursuant to section 654.

Where the sentence for an underlying offense is an indeterminate term, the punishment for any gang allegation found true in connection with that offense is not an additional determinate term under section 186.22, subdivision (b)(1)(C), but a minimum term before parole eligibility of 15 years pursuant to section 186.22, subdivision (b)(5). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1010-1011.) This rule applies even where it will have no practical effect, such as in the case of indeterminate terms for offenses that by definition already carry minimum terms of 15 years or greater. (See *id.* at p. 1009 [discussing first and second degree murder].) The trial court therefore improperly imposed additional 15-year enhancements for the gang allegations found true in

connection with convictions on counts 1 and 2, both of which by law required indeterminate terms.

B. Shooting at an Occupied Car

In their original briefs, the parties did not address the legality of the sentences imposed for the shooting at an occupied car convictions returned on counts 3 and 4. We requested supplemental briefing on this issue.

With respect to Martinez's conviction for the May 1 shooting at an occupied car (count 3), the trial court's stated sentence was not clear:

"But as to count three [the May 1 shooting], which was that earlier situation, probation is denied. [¶] The defendant is sentenced to the mid term of five years, but pursuant to the gang allegation it's 15 years to life on that. So that's consecutive."

In the abstract of judgment, the clerk interpreted this to mean a midterm of five years for the substantive offense, plus a consecutive determinate term of 15 years for the gang allegation.

With respect to the conviction for the May 2 shooting at an occupied car (count 4), the trial court sentenced Martinez to a determinate midterm of 5 years for the substantive offense, plus a consecutive determinate term of 15 years for the gang allegation, but stayed the total term of 20 years pursuant to section 654. The trial court sentenced Galindez to an indeterminate term of 15 years to life for the substantive offense, plus an additional indeterminate term of 25 years to life for the firearm enhancement, plus an additional unstated term for the gang allegation. The trial court then stayed the entire term pursuant to section 654.

Neither the sentences imposed on Martinez nor the sentence imposed on Galindez for the section 246 convictions were legal. The sentence for shooting at an occupied car where a criminal street gang allegation is also found true is an indeterminate term, with a minimum term the greater of the determinate term (including enhancements) that would otherwise be imposed pursuant to section 1170, or 15 years. (§ 186.22, subd. (b)(4); *People v. Sok* (2010) 181 Cal.App.4th 88, 96-99.) If used to calculate the minimum term under option one, above, enhancements are *not* added to the indeterminate term. (*Id.* at p.

97.) Section 186.22, subdivision (b)(4) is an alternative penalty, not a determinate term enhancement. (*People v. Sok, supra*, at p. 96.)

Thus, pursuant to section 186.22, subdivision (b)(4), Martinez's sentences on counts 3 and 4 should be indeterminate terms of 15 years to life. There are three possible indeterminate terms for Galindez on count 4: the low term of 3 years for the section 246 conviction, plus 25 years for the gun enhancement for a total term of 28 years to life; the midterm of 5 years for the section 246 conviction, plus 25 years for the gun enhancement for a total term of 30 years to life; or the high term of 7 years for the section 246 conviction, plus 25 years for the gun enhancement for a total term of 32 years to life. (See *People v. Sok, supra*, 181 Cal.App.4th at pp. 96-98.)

Martinez contends that he cannot be punished with the indeterminate term described above because section 186.22, subdivision (b)(4), was not cited in support of the gang allegations in the information or in support of the gang allegation findings on the verdict forms. He argues he did not receive adequate notice that the gang allegations would subject him to an indeterminate term if he was convicted of the offenses charged in counts 3 and 4. For the reasons that follow, we disagree.

In connection with counts 3 and 4, the information stated gang allegations in the appropriate statutory language, but cited as the legal authority section 186.22, subdivision (b)(1)(C), rather than section 186.22, subdivision (b)(4). The verdict forms likewise stated the gang allegations in the appropriate language but also referenced section 186.22, subdivision (b)(1)(C), as the statutory basis. Section 186.22, subdivision (b)(1)(C), requires an additional 10-year term when the gang allegation is found true. It, however, only applies to violent felonies, which a section 246 violation is not. (See § 186.22, subd. (b)(1)(C), § 667.5, subd. (c).) Consequently, Martinez argues, he cannot receive indeterminate terms because the correct statutory subdivision was not cited and he cannot receive 10-year determinate terms because the subdivision cited does not legally apply to his convictions.

In support of his argument, Martinez cites two cases: *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*) and *People v. Botello* (2010) 183 Cal.App.4th 1014 (*Botello*). In *Mancebo*, a jury convicted the defendant of forcible rape (§ 261, subd. (a)(2)) against

one victim on one date and forcible sodomy (§ 286, subd. (c)) against a separate victim on a different date. The jury also found true two, "One Strike" circumstances (§ 667.61, subd. (e)) in connection with each count: use of a gun and kidnapping with respect to the rape victim and use of a gun and tying and binding with respect to the sodomy victim. (*Mancebo, supra,* at p. 740.) The two One Strike circumstances found true on each count made defendant eligible for a 25-to-life indeterminate term on each count. (*Id.* at p. 742; see § 667.61, subd. (a).)

The jury also found true personal use of a firearm allegations on each count (§ 12022.5, subd. (a)). (*Mancebo, supra,* 27 Cal.4th at p. 742.) For a reason not expressly disclosed by the trial record, the People did not allege a "multiple victim" One Strike circumstance (§ 667.61, subd. (e)), so the jury made no such finding on either count. (*Mancebo, supra,* at p. 739.)

The trial court sentenced defendant to two consecutive 25-to-life One Strike terms for the two counts, but did so by substituting a "multiple victim" One Strike circumstance for the proved gun use circumstance with respect to each victim. This allowed the trial court then to add two consecutive 10-year determinate terms for the section 12022.5 personal use allegations, since the gun use was no longer needed to establish the two circumstances required for the 25-to-life term under the One Strike enhancement. (*Mancebo, supra,* 27 Cal.4th at p. 740.) On appeal, the People acknowledged that the multiple victim circumstance was neither separately alleged nor proved at trial, but argued that it was "effectively" pleaded and proved by the substantive counts alleging different victims and the jury's return of guilty verdicts on those counts. (*Id.* at pp. 744-745.)

The Supreme Court disagreed. The court found a due process violation because the prosecution never gave notice that it intended to use the fact of multiple victims to seek the indeterminate One Strike term, and then also use one of the pleaded "One Strike" facts instead to support a consecutive 10-year gun enhancement. (*Mancebo, supra,* 27 Cal.4th at p. 753.) The court also found statutory error because the multiple victim circumstance was never formally pleaded and proved, as required by the One Strike statute. (*Mancebo, supra,* at p. 753.) The court therefore struck the two 10-year

gun enhancements and instead required the gun use to be used in support of the One Strike indeterminate terms. (*Mancebo,* at p. 754.)

In *Botello,* a jury convicted both defendants -- who were identical twin brothers -- of two counts of willful, deliberate and premeditated attempted murder (§ 664, § 187). The jury also found true allegations that each defendant (1) personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) and (2) committed the crimes to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). (*Botello, supra,* 183 Cal.App.4th at pp. 1016, 1017.) For the gun enhancements, the trial court imposed consecutive 25-to-life indeterminate terms. (*Id.* at p. 1022.)

On appeal to Division Four of this court, the People conceded and the court agreed that the evidence was insufficient to support the true findings on the gun allegations because the evidence did not establish which of the two defendants actually discharged the weapon. (*Botello, supra,* 183 Cal.App.4th at p. 1022.) Nevertheless, the People argued that the 25-to-life indeterminate terms should be upheld based upon section 12022.53, subdivision (e)(1), which provides for such a term when a defendant is convicted of certain offenses, including attempted murder, and the jury also finds that (1) *any principal* in the crime discharged a firearm, and (2) the defendant committed the crime to benefit a criminal street gang. (*Botello,* at p. 1022.) The People argued that the elements of section 12022.53, subdivision (e)(1) were satisfied since (1) the jury convicted both defendants of attempted murder (meaning both were therefore principals), (2) the evidence showed that one of the two discharged the firearm causing great bodily injury, and (3) the jury found that both committed the crime to benefit a criminal street gang. (*Botello, supra,* at p. 1022.)

Division Four rejected the People's argument based largely on *Mancebo.* The court noted that an enhancement pursuant to section 12022.53, subdivision (e)(1), like One Strike circumstances pursuant to section 667.61, subdivision (e), must be separately pleaded and proved to the jury. (*Botello, supra,* 183 Cal.App.4th at p. 1026.) Because that was not done, the People could not rely on section 12022.53, subdivision (e)(1) to save the firearm enhancement terms: "to apply section 12022.53, subdivision (e)(1) for the first time on appeal would violate the express pleading requirement of that provision,

and defendants' due process right to notice that subdivision (e)(1) would be used to increase their sentences." (*Botello, supra,* at p. 1027.)

Both *Mancebo* and *Botello* are distinguishable from, and therefore not dispositive of, the immediate case. In both, the People attempted to rely on *facts* not separately pleaded and proved -- as statutorily required -- but implicitly proved by the verdicts on the substantive charges. In contrast, both the information and the verdict forms in the immediate case separately stated the gang allegations in the appropriate statutory language. The court properly instructed the jury on the elements of the gang allegations. Finally, the jury returned separate true findings which are amply supported by the trial record. Martinez does not contend otherwise. Under these circumstances, the erroneous citation to section 186.22, subdivision (b)(1)(C) and the failure to cite section 186.22, subdivision (b)(4) do not require reversal. The allegations as written gave Martinez sufficient notice that the People intended to prove a gang allegation and use that to increase his sentence on counts 3 and 4. "[I]t is the language of the accusatory pleading which is controlling and not the specification of the statute by number." (*People v. Thomas* (1987) 43 Cal.3d 818, 826, 831.)

Further, in both *Mancebo* and *Botello* the record demonstrated that the failure to allege and prove the enhancements separately may have been a discretionary charging decision rather than due to mistake or excusable neglect. (*Mancebo, supra*, 27 Cal.4th at p. 749; see *Botello, supra,* 183 Cal.App.4th at p. 1028.) The record supports the opposite finding here: the People separately pleaded and proved an allegation based on the correct statutory language but cited, as legal authority, an inapplicable statutory subdivision.

Martinez received notice that the People intended to prove gang allegations pursuant to section 186.22, subdivision (b), and use those allegations to increase his sentences on counts 3 and 4. The allegations were separately pleaded and proved to the jury, and Martinez provides us with no argument how his defense would have differed had the correct subdivision been cited. Indeed, given the record, we cannot conceive of any such prejudice. The mandatory sentence on counts 3 and 4, therefore, is the indeterminate term set forth in section 186.22, subdivision (b)(4). (See *People v. Thomas, supra,* 43 Cal.3d at p. 831; *People v. Sok, supra,* 181 Cal.App.4th at p. 96, fn. 8;

cf. *Mancebo, supra,* 27 Cal.4th at p. 749 [harmless error analysis inapplicable where record demonstrates discretionary charging decision]; *Botello, supra,* 183 Cal.App.4th at p. 1028 [same].)[4]

C. Remand

Appellants' sentences will be vacated and the case remanded to the trial court for resentencing consistent with this opinion.

In light of the new indeterminate terms that will be imposed on counts 3 and 4, the trial court, on remand, must also decide which sentences should be stayed pursuant to section 654. (See *People v. Sok, supra,* 181 Cal.App.4th at pp. 99-100.)

DISPOSITION

The sentences are vacated and the case is remanded for resentencing consistent with this opinion. In all other respects, the judgments are affirmed.

SORTINO, J.*

We concur:

FLIER, Acting P. J.

GRIMES, J.

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[4] In his supplemental briefing, Martinez argues that no gang allegation whatsoever was separately pleaded against him with respect to count 4 and therefore he cannot be punished under section 186.22, subdivision (b)(4) on that count. The record shows otherwise: the information contains a separate gang allegation in the correct statutory language in connection with count 4. It does, however, still allege the incorrect statutory authority of section 186.22, subdivision (b)(1)(C).

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.